defense UPDATE

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ARE INSURANCE COMPANIES OBLIGATED TO PROTECT OTHER INSURANCE COMPANIES?

An Unsettled Issue in Iowa Subrogation Law

By Lori K. Geadelmann, Des Moines, Iowa

Scenario: Joe Insured is insured under an automobile policy written by ABC Insurance Company which provides medical payments coverage. Joe Insured is involved in an accident with Tammy Tortfeasor and suffers injuries. His medical bills are paid by ABC Insurance Company and he executes a Loan and Trust Agreement in favor of ABC agreeing to repay these amounts out of any settlement proceeds he receives from any party at fault in the accident.

Tortfeasor is clearly at fault in the accident. She is insured by XYZ Insurance Company whose claims representative contacts Insured regarding settlement of his property damage, personal injury and lost wage claims. During settlement negotiations, ABC Insurance Company sends a letter to XYZ Insurance Company with a copy to Tortfeasor notifying them of ABC's subrogation interest arising out of the medical payments. XYZ settles with Insured for the amount of his damages, including his medical bills, without notifying ABC. Insured signs a general release, releasing XYZ and Tortfeasor from any further claims of any nature arising out of the accident. Insured does not repay ABC out of the settlement proceeds.

What can ABC do? Is ABC's sole recourse against its insured or does ABC have any recourse against XYZ? Against Tortfeasor?

The issue of whether a tortfeasor and his or her insurance company have a duty to protect the subrogation interest of an injured party's insurance carrier when notice of this interest has been provided to the tortfeasor and the insurance company is an unsettled issue in the state of Iowa. No appellate court has decided the issue, although the Iowa Supreme Court, in *United Security Insurance Co. v. Johnson,* recognized that this situation may exist.[1] The Court, however, refused to express its opinion on the issue as it was not relevant in that case.[2]

Many other jurisdictions *have* addressed this issue, and the vast majority have found that a subrogated insurer has a cause of action against a tortfeasor for failing to protect its subrogation interest if the tortfeasor settles with an insured with knowledge of the subrogated insurer's interest.[3] Several of these jurisdictions have also recognized that the duty to protect the subrogated insurer's interest extends to the tortfeasor's liability insurer as well when the insurer has notice of this interest.[4] This extension of the duty makes sense given that many, if not most, settlements between a tortfeasor and an injured party are in actuality negotiated between the tortfeasor's liability insurer and the injured party.

Source of the Duty

Courts have used a number of rationales to find such a duty on the part of a tortfeasor or the tortfeasor's insurer. One such rationale is that the tortfeasor's or the tortfeasor's insurer's action in settling with the insured constitutes a form of fraud on the subrogated insurer when the tortfeasor or tortfeasor's insurer is aware of the subrogated insurer's interest.[5] The Michigan Supreme Court stated, "[W]here, with knowledge of a previous settlement by the insurer with the insured, a tortfeasor who is responsible for the loss procures a release by making a settlement with the insured, the release amounts to a fraud upon the insurer's right, and therefore constitutes no defense as against the insurer in an

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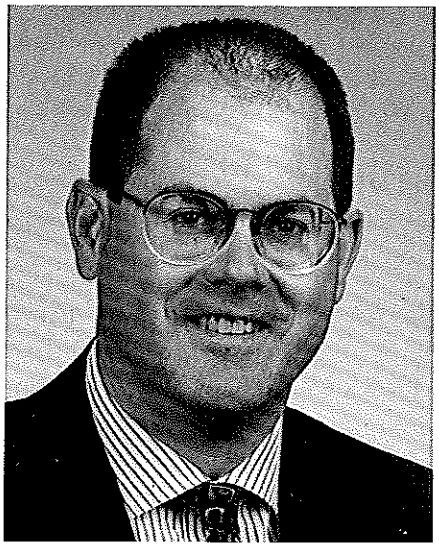
MESSAGE FROM THE PRESIDENT



Gregory M. Lederer
President

Historically, one of the Iowa Defense Counsel Association's most important functions is its legislative program. The valuable work done at the Statehouse in the past by dedicated people like Past President Herb Selby and lobbyist Kevin Kelly has probably gone unnoticed by many IDCA members. Once you become a board member, however, you see legislation as a focal point of activity and responsibility for the IDCA. We have tried, with some success, to help the legislature pass laws that make sense, first, and reflect a conservative view of social, economic, and legal responsibilities, second. We also have sought to preserve fairness in the civil justice system and its procedures. Our biggest responsibility, however, has been opposing legislation proposed by the plaintiffs' bar and its allies. IDCA has taken this responsibility seriously. Some of these battles have been hard fought and won at a cost to comity and reputation. Iowa law is better for our efforts, however.

As political tides turn, new responsibilities appear. It would be easy (and could well be popular with some members and many clients) to "catch the wave" of tort and civil justice reform and campaign for drastic restructuring of our laws and our systems. So far, at least, IDCA's board of directors has declined that opportunity, in favor of a more cautious approach. We certainly are interested in reform, but we have not embraced radical, precipitous change.

Let me be specific. IDCA continues to oppose caps. IDCA continues to oppose substantive tort reform that grants to defendants either unnecessary or unjustified protections from liability. IDCA continues to oppose tort reform that applies only to selected segments of the "defense population." IDCA continues to oppose emasculation of the right to a jury trial or any other essential ingredient of our civil justice system. I regard these proposals as variously faddish, over-reactive, customized to special interests, and akin to band-aids. Some just do not make good sense.

What does IDCA favor in this more defense-friendly political environment? Careful, even-handed, and sensible tort reform. A good example is IDCA's bill that would overrule *Schwennen v. Abel.* The Iowa Supreme Court has not seen fit to abandon the rule of "nonderivity" for consortium claims, which rule was fashioned only to ameliorate the harsh consequences of a contributory-negligence system. IDCA is committed to achieving this reform, long overdue but only now attainable. This reform is sensible. It reflects a fair view of legal responsibility for tortious conduct by *all* actors. It would apply to all 668 defendants. It constitutes an adjustment rather than an overhaul.

Mark Tripp of the Bradshaw firm in Des Moines is the chair of IDCA's legislative committee. IDCA's legislative consultant is Robert Kreamer of the Whitfield firm and formerly of the Iowa Legislature. They, the legislative committee, and the board have spent much time on these important issues, just as IDCA always has done. As the pendulum continues to swing, we will continue to consider IDCA's opportunities, as well as its responsibilities to its constituency and the system in which we all live.

If you have your own ideas about legislative initiatives, please contact me, Mark, or any other member of the board.□

SUPREME COURT INTERPRETS *"HERNANDEZ"* AMENDMENT TO U.I.M. STATUTE

By Mark L.Tripp, Des Moines, Iowa

Starting in 1985 with the case of *American States Insurance Company v. Estate of Tollari,* 362 N.W.2d 519 (Iowa 1985), the Iowa Supreme Court announced the use of two distinctly different analytical approaches to be used in uninsured and underinsured coverage analysis. With respect to uninsured claims, the court would apply a "narrow coverage" view. This narrow coverage view was used because the court felt that the General Assembly intended uninsured motorist coverage to protect an insured only to the level of statutory minimum liability limits. In *Tollari,* however, the court adopted the "broad coverage" view when analyzing underinsured motorist claims. In *Tollari* the court reasoned that the "broad coverage" view was required because the General Assembly contemplated that a buyer of underinsured coverage should be entitled to recover for the amount of loss that the tortfeasor's liability insurance didn't reach, subject only to the limit of the underinsured coverage.

Under this bifurcated analytical approach, insurance carriers were allowed to implement offsets and exclusions so as to restrict an insured's ability to recover more than the statutory minimum liability limits under the uninsured motorist provisions of a policy. In the underinsured area, however, similar offsets and exclusions were often held invalid because such policy provisions violated what the court believed was the General Assembly's intent with respect to underinsured coverage. The "broad coverage" view used by the court in *Tollari* reached its logical conclusion in the case of *Hernandez v. Farmers Insurance Company,* 460 N.W.2nd 842 (Iowa 1990). In *Hernandez* the court, relying on its perception of legislative intent as expressed in *Tollari,* disallowed the use of anti-stacking provisions in the context of an underinsured motorist claim. In response to the *Hernandez* decision, the General Assembly amended Iowa Code Section 516A.2 by specifically abrogating the *Hernandez* decision. Just as importantly subparagraph 3 was added to Iowa Code Section 516A.2 so as to more clearly set forth the General Assembly's intent with respect to un-, underinsured and hit-and-run motorist coverage.

In *Mewes v. State Farm Automobile Insurance Company,* 530 N.W.2d 718 (Iowa 1995), the Iowa Supreme Court specifically addressed the significance of the 1991 amendments to Iowa Code Section 516A.2. The *Mewes* case involved a rear-end automobile accident. Jane Mewes was a passenger in a car that was rear-ended by a tortfeasor. Mewes was entitled to make a claim under the underinsured motorist provisions of the policy insuring the car in which she was a passenger. This policy provided underinsured coverage in the amount of $50,000. Mewes was also insured with State Farm under three separate automobile liability policies. Two of these policies contained underinsured motorist limits of $20,000 and the third policy contained an underinsured motorist limit of $50,000. Prior to trial the tortfeasor's liability limits were offered and accepted. In addition Mewes received $50,000 under the underinsured motorist coverage provided by the insurer of the vehicle in which she was a passenger. State Farm remained the only defendant.

Prior to the 1991 amendments to 516A.2, Mewes would have been able to claim access to all three State Farm coverage. Access to all three coverage would have been allowed due to the "broad coverage" view used by the court in analyzing underinsured coverage. The State Farm policies insuring Mewes contained "anti-stacking" and "excess" provisions which read in part as follows:

"If there is Other Underinsured Motor Vehicle Coverage

....

3. If the insured sustains bodily injury while occupying a vehicle not owned by you, your spouse or any relative,

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PRODUCTS LIABILITY OF NONMANUFACTURERS - § 613.18

By Mark S. Brownlee, Fort Dodge, Iowa

Iowa Code § 613.18
Limitation on products liability of nonmanufacturers.

1. A person who is not the assembler, designer, or manufacturer, and who wholesales, retails, distributes, or otherwise sells a product is:

a. Immune from any suit based upon strict liability in tort or breach of implied warranty of merchantability which arises solely from an alleged defect in the original design or manufacture of the product.

b. Not liable for damages based upon strict liability in tort or breach of implied warranty of merchantability for the product upon proof that the manufacturer is subject to the jurisdiction of the courts of this state and has not been judicially declared insolvent.

2. A person who is a retailer of a product and who assembles a product, such assembly having no causal relationship to the injury from which the claim arises, is not liable for damages based upon strict liability in tort or breach of implied warranty of merchantability which arises from an alleged defect in the original design or manufacture of the product upon proof that the manufacturer is subject to the jurisdiction of the courts of this state and has not been judicially declared insolvent.

3. An action brought pursuant to this section, where the claimant certifies that the manufacturer of the product is not yet identifiable, tolls the statute of limitations against such manufacturer until such time as discovery in the case has identified the manufacturer.

Iowa Code § 613.18, sometimes referred to as the "innocent retailer rule," was part of the same 1986 legislation as § 668.12, which codified the state of the art defense for product liability cases. Simply stated, § 613.18 affords protection to nonmanufacturers from certain claims based upon alleged defects or deficiencies in products they merely sold, but did not assemble, design or manufacture. Unfortunately, the less than artful drafting of its provisions gives rise to numerous questions of interpretation and application, only some of which have been addressed by the Iowa Supreme Court.

1. Does § 613.18 constitute an affirmative defense to be pleaded and proved by defendants?

No. In *Erickson v. Wright Welding Supply, Inc.*, 485 N.W.2d 82 (Iowa 1992), the Iowa Supreme Court ruled that § 613.18 is not an affirmative defense. Rather, "a plaintiff must establish the (defendant) seller is not in the newly defined class of sellers immune from suit or whose liability is precluded by statute."

Placing the burden upon the plaintiff is an interesting departure from the approach utilized in § 668.12 (state of the art defense), which is expressly characterized as an affirmative defense to be pleaded and proved by the defendant. The conspicuous absence of such guidance in § 613.18 was presumably significant to the Court's interpretation in *Erickson.*

Although *Erickson* held that § 613.18 "need not be raised" by responsive pleading, the Court advised that:

> ". . . it is appropriate that this issue be raised by motion or pleading at the early stages of the litigation process. Parties should utilize the most efficient method to promptly establish the true facts and then present the statutory issue for court determination."

Erickson, at p. 86. It is difficult to derive exactly what is contemplated by the Court's vague invitation for an early "motion or pleading." If the issue were presented on the face of the pleadings, an adjudication of law points might be appropriate. If not, a summary judgment motion would be the logical way of bringing the matter before the trial court inasmuch as the pre-trial application of § 613.18 would implicitly require the absence of any genuine issue of fact regarding a defendant's qualification for the protection under the statute provides.

The Court's suggestion that the parties "promptly establish the true

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APPELLATE CASE UPDATE

By Michael W. Ellwanger, Sioux City, Iowa

The *Defense Update* will periodically contain a summary of selected recent decisions of the Iowa Supreme Court and the Iowa Court of Appeals which might be of interest to IDCA members. The summaries will be brief and for the primary purpose of alerting members to recent appellate decisions in various areas of civil trial practice. The case opinions should be reviewed for further details and analysis. Individual case notes analyzing cases of particular significance will continue to be published periodically.

1. *Mosel v. Estate of Marks*, 526 N.W.2d 179 (Iowa App. 1995)

Sudden Emergency Doctrine

Parties collided at crest of hill. Defendant contends that he swerved to avoid a deer. Defense verdict reversed. It was error for the court not to give the sudden emergency doctrine instruction.

2. *Beyond the Garden Gate Inc. v. North Star Freeze Dry Manufacturing, Inc.*, 526 N.W.2d 305 (Iowa 1995)

Damages - Lost Profits

Plaintiff purchased a used machine from a private seller. Difficulties with the machine caused the plaintiff to sue the manufacturer directly. The court held that although a "non-privity buyer" may recover for direct economic loss damages (difference between value as warranted and actual value), he could not recover for consequential damages (repair bills, lost profits, etc.).

3. *McGough v. Gabus*, 526 N.W.2d 328 (Iowa 1995)

Fraud - Sale of Business

Supreme Court affirms substantial recovery (against seller of business) based upon allegations of fraud in the sale of said business. The court also rules that the plaintiff should have recovered pre-filing interest for that portion of the jury's verdict representing "benefit of the bargain" damages. The court did set aside some of the damages as being duplicate recovery.

4. *Second Injury Fund v. Bergeson*, 526 N.W.2d 543 (Iowa 1995)

Work Comp

Work comp case involving Second Injury Fund.

5. *Ballard v. Amana Society, Inc.*, 526 N.W.2d 558 (Iowa 1995)

Damages - Lost Profits

Farmer suffered significant losses due to toxic feed corn. Jury found that the defendant was 80% at fault, and awarded damages which included lost profits. Verdict affirmed. Much of the decision relates to a discussion of the recoverability of lost profits. Court also holds that it was appropriate to instruct on both strict liability and breach of warranty.

6. *Weems v. Hy-Vee Food Stores. Inc.*, 526 N.W.2d 571 (Iowa App. 1995)

Superseding Clause

Premises liability case. Jury held that store owner was 60% at fault. Court of Appeals held that the store owner was not entitled to a jury instruction that complications from subsequent medical treatment was an intervening superseding cause.

7. *Dunlavey v. Economy Fire & Casualty*, 526 N.W.2d 845 (Iowa 1995)

Work Comp - Mental Injury

Plaintiff was entitled to recover for depression because of work conditions. Plaintiff was a claims handler for defendant. As a result of merger of two insurance companies, his work load was increased and he felt that he was being pressured out of the company. The court holds that in order to recover for a "non-traumatic mental injury," the plaintiff must first establish a factual or medical causation—that he has suffered a mental injury which was caused by mental stimuli in the work environment. Second, the employee must establish legal causation—that the mental injury was caused by work place stress of greater magnitude then the day to day mental stresses experienced by other workers employed in the same or similar jobs, regardless of their employer.

8. *2049 Group. Ltd. v. Galt Sand Co.*, 526 N.W.2d 876 (Iowa App. 1995)

Discovery Sanctions

District court dismissed suit as a sanction for failure to comply with discovery order. Court of Appeals holds that this was an abuse of dis-

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1995 LEGISLATIVE SESSION

By Robert M. Kreamer, Des Moines, Iowa

The 1995 Legislative session, like the past two sessions, continues to experience partisan and philosophical gridlock on issues of interest and importance to the Iowa Defense Counsel Association. The Iowa Senate remains under Democrat control by the same 27-23 margin of the past two years. Republicans strengthened their control of the Iowa House of Representatives from 51-49 to a current margin of 64-36. Like the 1992 general election, there were a large number (26%) of freshman legislators elected in 1994 to the Iowa House of Representatives and Iowa Senate. Many of these new members were elected to the Iowa House and were both conservative and energetic in the pursuit of their legislative agenda.

Many of these newly elected members to the Iowa House possessed conservative philosophies and high energy levels and were to tackle some legislative issues heretofore considered too politically sensitive. While some of these issues of interest to the Defense Bar received attention and approval by the Iowa House of Representatives they ran into considerable resistance in the Iowa Senate and consequently gridlock was the result.

Legislation introduced in the 1995 legislative session of interest to the Defense Bar included the following bills:

House File 130 - This legislation would allow the defendant, in any action where the plaintiff is a governmental entity, the right to inform the jury of its prerogative to judge the applicable law of the case as well as the facts and to return a verdict which does not apply the law as instructed by the judge. This legislation, opposed by all segments of the organized Bar, was approved by the House Judiciary Committee, but died on the House Calendar.

Senate File 257 - This so-called "Sunshine in Litigation Act" creating a presumption that all court records in civil actions are open to the public unless access is restricted by law was approved by the Senate Judiciary Committee. After this same subject matter was offered as an amendment to the Products Liability legislation (House File 362) and defeated by a vote of 60-33 in the Iowa House, this legislation was removed from the Senate Calendar and re-referred to the Senate Judiciary Committee.

House File 345 - This legislation would eliminate the statutory 10% interest provision found in Iowa Code Section 535.3 and provide that this interest should be at a rate found in Iowa Code Section 668.13. This legislation passed the Iowa House of Representatives by a vote of 92-4, and is now in the Senate Judiciary Committee.

House File 362 - This legislation provides that the statute of limitations for a products liability action is ten years from the date the product is first purchased. It is also provided that where misuse, failure to maintain, or unauthorized alteration of a product is the primary cause of injury, the manufacturer, assembler, designer, wholesaler, retailer or distributor from whom recovery of damages is sought shall not have any percentage of fault allocated against them under Iowa's comparative fault law. This legislation passed the Iowa House of Representatives by a vote of 63-33 and is now in the Senate Judiciary Committee.

House File 394 - This legislation provides that an action for medical malpractice allegedly committed on a minor under age six must be commenced prior to the minor's eighth birthday. This legislation passed the Iowa House of Representatives by a vote of 71-24 and is now in the Senate Judiciary Committee.

Senate File 431- This legislation allows the professional license of a person to be revoked if they are one month delinquent in their child support obligation. This legislation passed the Iowa Senate and Iowa House of Representatives unanimously and has been signed into law by Governor Terry E. Branstad.

House File 300 (Companion Bill SSB 266) - This legislation would eliminate joint and several liability in comparative fault

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action to enforce its right of subrogation against the tort feasor."[6] The Minnesota Supreme Court agreed, finding a settlement between the tortfeasor or the tortfeasor's liability insurer and the insured to be "the equivalent of a fraud upon the insurer" and therefore having "no effect upon the insurer's subrogation rights."[7]

In a 1980 case, an Illinois Appellate Court upheld a cause of action by a subrogated insurer against the tortfeasor's insurer for "fraudulent inducement" of breach of an insurance contract.[8] The subrogated insurer claimed the tortfeasor's insurer induced a breach of the insurance contract between it and its insured by inducing the insured to execute a release of all liability.[9] The court held, "[I]t is not necessary to allege and prove actual fraud in order for the insurer-subrogee to maintain a subrogation action against the tortfeasor. In *Home Ins. Co.*, the court observed that the procurement of a release under these circumstances 'amounts to a fraud upon the insurer's right' and thus is no defense to a subrogation action."[10]

Another theory advanced is that the tortfeasor or tortfeasor's insurer is estopped from raising a release by the insured as a defense to an action by the subrogated insurer when the tortfeasor or the insurer knew of the subrogation interest. A Florida court relied on this theory in a case in which a subrogated insurer sued its own insured to recover payments it made to her after she settled with the tortfeasor and executed a release.[11] The insurer, Motors Insurance Company, claimed that the insured had prejudiced Motors' rights as subrogee against the tortfeasor and asked for summary judgment against the insured which request the trial court granted.[12] In reversing, the appellate court found Motors' subrogation rights had not been prejudiced as the tortfeasor obtained the release from the insured with knowledge of Motors' subrogation rights and therefore was estopped from raising the release as a defense to an action by Motors' against him.[13]

Other jurisdictions have found that an insurer's indemnification of its insured operates as a form of implied assignment of the insured's claims against the tortfeasor.[14] Still others have held that upon payment to its insured, an insurer becomes subrogated by operation of law to the insured's interests, and therefore nothing done by the insured can destroy the insurer's subrogation interests.[15]

Exceptions to the Duty

Regardless of the legal rationale courts have used to find a duty to protect the subrogation interests of another insurer on the part of a tortfeasor or its insurer, most courts recognize that there are two exceptions to this duty. The first is when the insured party settles with the tortfeasor and executes a valid release of liability for the loss *before* the insurer pays the claim under its policy. Courts have generally held that, "at least in the absence of fraud or collusion against the insurer, the settlement and release [bars] the insurer's right of recovery from the wrongdoer."[16] The insurer is not out of luck in this circumstance, however, as the release by the insured will, as a rule, void the insurance policy and preclude the insured from recovering under the policy.[17] If the insurer pays under the policy without knowledge of the prior release, the insured is generally obligated to reimburse the insurer.[18]

The obligation on the part of the insured not to settle with or release the tortfeasor without the insurer's permission arises out of the insured's implied covenant of good faith and fair dealing, as well as, in many cases, out of an express policy provision.[19]

An Iowa case supports the rule that an insured who settles with and releases the tortfeasor prior to recovering under his insurance policy is barred from recovering under that policy. In *Conard v. Moreland,* a tractor owned by Moreland was damaged by a tortfeasor.[20]

Moreland obtained a judgment against the tortfeasor and collected $8,500 from the tortfeasor. More-

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land owed Conard $1,517 for the purchase price of the tractor but did not repay Conard out of the amount he received from the tortfeasor. Conard, who was a loss payee under the tractor insurance policy, sued both Moreland and the insurer of the tractor. The trial court entered judgment against both defendants. On appeal, the Supreme Court reversed with regard to the insurer holding that Conard had no greater right to recover under the insurance policy than Moreland, and that Moreland was barred from recovering under the policy "because he had recovered the full amount of the damages to his tractor and also because he had deprived defendant of its contract right of subrogation against the wrongdoer...."[21] The Iowa Supreme Court recognized that once the insurer was deprived of its subrogation rights, it was discharged from its obligations under the policy.[22]

The second exception is when the tortfeasor or its insurer settles with the injured party without notice of the subrogated insurer's interest. Courts have been clear that "where, after the insurer had paid a claim of damage to the property, the tortfeasor, acting in good faith and without knowledge or notice of the insurance company's payment or subrogation rights, effectively settles with and obtains a full or general release from the insured, such settlement and release will constitute a defense to the insurer's suit against the tortfeasor for reimbursement."[23]

Necessary Knowledge

The amount of knowledge on the part of the tortfeasor or its insurer necessary to impose the duty to protect has been addressed in a number of cases. Notice to a tortfeasor or its insurer usually takes the form of a letter from the subrogated insurer noting its interest in the matter and often setting forth the amount the subrogated insurer has paid its insured.[24] Courts have indicated that "the tortfeasor's possession of information, which, reasonably pursued, would have given it knowledge that the insurer had paid and become subrogated to claims against the tortfeasor, may be sufficient" to invoke the duty to protect.[25]

A New York case found knowledge of three independent facts necessary to find the tortfeasor had sufficient knowledge to impose a duty on him or her.[26] First, the tortfeasor or its insurer must have knowledge of the subrogated insurer's status as insurer of the injured party. Second, the tortfeasor or its insurer must have knowledge that coverage exists for the particular claim. Third, the tortfeasor or its insurer must have knowledge that the other insurer has been subrogated to the rights of the insured. After noting these three knowledge requirements, the court in *Aetna Casualty & Surety Co. v. Norwalk Foods, Inc.*, considered whether the burden in such a case was on the tortfeasor to inquire about a potential subrogation interest or on the subrogated insurer to provide notice of its interest to the tortfeasor.[27] The court found it preferable to require the subrogated insurer to give notice of its interest to the tortfeasor upon acquiring such an interest rather than requiring a settlement to be delayed while the tortfeasor investigates the possibility of a subrogation interest.[28]

In at least one case, however, a court found constructive notice of the subrogation interest sufficient to create a duty. In *Poole Truck Line, Inc. v. State Farm Mutual Automobile Insurance Co.*, an injured party settled with the tortfeasor prior to collecting $10,000 in no-fault benefits from State Farm, their insurance carrier.[29] State Farm brought a subrogation action against the tortfeasor and its insurer, who raised the release by the insured and their lack of knowledge of the subrogation interest as defenses to the action. The Georgia court held that while it was unable to determine from the record if the defendants had notice of the subrogation interest,

> [they] can be found to have constructive notice of [State Farm's] statutory right of subrogation as no fault coverage is mandatory in Georgia. Those

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who use the roads in Georgia (in this case a transport trucking firm and its insurance carrier) are presumed to know the law which gives the injured party's insurance company a statutory right of subrogation in accidents involving a vehicle weighing more than 6,500 pounds. Therefore, anyone who seeks to settle with the insured party and obtains a release without the insurer's consent does so at his own risk.[30]

At the other extreme, however, is a 1935 California case in which the subrogated insurer sent a letter to the tortfeasor indicating that it was the insurance carrier for the injured party and that it considered the tortfeasor to be liable for the damages to its insured's vehicle.[31] The court found this letter insufficient to provide notice to the tortfeasor of the subrogation interest. It held that reading the letter as a whole, the tortfeasor "might assume the carrier had not paid, and we see nothing on the face of the letter that purports to inform [him] that on May 24, 1932, the day the letter was written, any subrogation or assignment had taken place."[32] It is questionable whether the court would have found differently if the letter had been provided to the tortfeasor's insurance carrier who, presumably, would have had more sophisticated knowledge of the role of subrogation and the likelihood that the insurer would have already paid under its policy.

Settlement for Less Than Full Damages

Another facet of the issue appears when the injured party settles with the tortfeasor for an amount equal to the amount of the injured party's out-of-pocket expenses *not* covered by the injured party's insurance.[33] This may occur either before or after the injured party receives payment from his or her insurance company. When the injured party settles with the tortfeasor *before* payment from the insurer and executes a general release, courts have held that the release does not reach the insurance company's subrogation interest which arises upon payment under the policy so long as the tortfeasor is aware of the existence and the likelihood of the insurance payment.[34] A Missouri court has held that "where the third party tortfeasor is aware of the interest of the [injured party's] insurer and consents to a settlement with the insured for that amount over and above the amount for which the insurer has paid or become obligated to pay," a general release is ineffective.[35] The court set forth its rationale saying,

> In such a case, the third party tortfeasor is held to have consented to the splitting of the cause of action against him and the potential of an unjust double recovery by the insured does not exist. [I]t would be patently unjust to permit a third party tortfeasor, with knowledge of an insurer's subrogation interest, to settle with the insured for less than the wrongdoer's full liability, and become thereby insulated against the insurer's right of action against the tortfeasor.[36]

Similarly, where a tortfeasor settles with the injured party for the part of the loss in excess of insurance coverage *after* payment of the insurance, general releases have been found to be ineffective. Courts have interpreted such a release to not apply to the insured portion of the loss and have allowed the subrogated insurer to proceed against the tortfeasor.[37] There is nothing wrong, however, when an injured party settles with the tortfeasor for the amount of loss in excess of insurance coverage and executes a release that expressly does not discharge the tortfeasor with regard to the subrogated insurer's rights.[38]

The Minority View

The majority of jurisdictions have chosen to follow the general rule that when a tortfeasor or its insurer, with notice of another insurer's subrogation claim, procures a general release by making a settlement with the insured injured party, the release will not affect the subrogated insurer's

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rights. In at least one jurisdiction, however, the court chose not to follow this rule. In *Preferred Risk Mutual Insurance Co. v. Courtney,* Preferred Risk paid its insured $4,525.21 for medical expenses and loss of income arising out of an accident with the tortfeasor. [39]

After payment under the policy, Preferred Risk notified the tortfeasor and his insurance company of its subrogation rights. Subsequently, the tortfeasor and his insurer settled with the insured and obtained a general release. Preferred Risk sued the tortfeasor and his insurer relying on the majority rule. The court noted a "conflict of authority" in the jurisdictions which have addressed the issue, but decided the issue in favor of the tortfeasor and his insurer reasoning as follows:

> By failing to secure an assignment from [their insureds], [Preferred Risk] left the defendants in the circuit court damage suits liable for all damages to the plaintiffs. [Preferred Risk] now seeks to recover, in an equity court, damages from the defendants which, if permitted, would amount to double recovery from the defendants for the same damages. [Preferred Risk] could have prevented double recovery by securing an assignment; this, it failed to do. It is contrary to all principles of equity to allow double recovery when it could have been prevented by the one seeking double recovery.[40]

The court found that, absent an assignment, the tortfeasors would be liable to the injured parties for all damages arising out of the accident because of the collateral source rule.[41] The court obviously felt it was inequitable to force the tortfeasor to pay twice for the same damages. It did not consider the possibility of fraud or collusion on the part of the tortfeasor in obtaining a full release from the injured party.

In contrast, the Illinois courts have come full circle on this issue. When initially asked to decide the issue, an Illinois court relied on much of the same reasoning as the Mississippi court to come to its conclusion.[42] In *Inter-Insurance Exchange of Chicago Motor Club v. Andersen,* the subrogated insurance company, Inter-Insurance, had paid its insured, Andersen, for property damage arising out of an accident between Andersen and Kuntz. Andersen subsequently settled with Kuntz without Inter-Insurance's permission and executed a general release in favor of Kuntz. Inter-Insurance brought suit against both Kuntz as the tortfeasor and against Andersen for breach of the insurance contract. The court considered how the subrogated insurer's interest could best be protected and decided that the appropriate course of action would be for the insurer to collect the amount of its subrogation interest from its insured who breached the insurance contract by settling with the tortfeasor without the insurer's permission.[43] The court found that the tortfeasor is a stranger to the insurance contract and that "placing the onus of protecting the insurer upon the insured, would seem more logical and certain."[44] The court found that the insured "has the duty of good faith whether expressed or not. He has signed and presumably read the insurance contract."[45]

Several years later, however, the Illinois Supreme Court revisited this issue. In *Home Insurance Company v. Hertz Corporation,* the court was faced with the typical scenario.[46] Home Insurance sought to recover from the defendant tortfeasor and insurer payments it had made to its insured under its insurance policy. The defendants raised as a defense a general release executed by the insured following settlement. The evidence was clear that the defendants had notice of Home Insurance's subrogation interest prior to the settlement.

The court noted the large number of jurisdictions which had followed the majority rule and then re-examined the appellate court's reasoning in reaching its decision in *Andersen.*[47] The court found the rule expressed in *Andersen* to be

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fundamentally unfair to both the insured and its insurer, stating:

> Denied enforcement of its subrogation rights against the real wrongdoer, the insurer must instead seek recovery from its own insured, an obviously unpalatable alternative. Thus the tortfeasor and his own liability insurer, if any, escape payment for damage caused by the tortfeasor, while the tort victim is effectively denied payment from his own insurance carrier *and* from the tortfeasor. The *Andersen* rule in these circumstances constitutes a trap for the unwary insured plaintiff. While no fraud is alleged here, the rule itself encourages fraud or, at the very least, sharp practice on the part of the tortfeasor or his insurance carrier. The insured may be an unsophisticated, unrepresented party presented with a full and final release which he is told he must sign in order to effect a needed settlement. To require him to execute a release of all claims, even though the tortfeasor has knowledge of the insurer's interest and the probable existence of a standard insurance policy provision obligating the insured to protect the insurer's subrogation rights, is simply not consistent with fair dealing and ought not to be encouraged.[48]

The court went on to adopt the majority view holding that a general release signed by an insured does not bar a subsequent action by the subrogated insurer against the tortfeasor, if the tortfeasor or its insurer knew of the subrogated insurer's interest prior to the release.[49]

Benefits of the Majority Rule

The Illinois Supreme Court's opinion in *Home Insurance Company v. Hertz Corporation* makes clear a number of the benefits of the majority view imposing a duty on the tortfeasor and the tortfeasor's insurer to protect the subrogation interests of the subrogated insurer when those interests are called to the tortfeasor's or its insurer's attention. First, an injured insured is less sophisticated in insurance and subrogation law than the tortfeasor's insurer and is less likely to realize the consequences of signing a general release without his or her insurer's permission. If the tortfeasor's insurer knows that it may have to pay twice for the same damages, it may be less likely to seek a quick settlement with the insured. While a tortfeasor's insurer who is required to pay additional sums to the subrogated insurer may have an action for these sums against the injured party based on the release, it is obviously more work for the insurer to collect these sums than it would be to protect the subrogated insurer's interest during initial settlement negotiations.

Second, the subrogated insurer may prefer not to sue its own insured to recover the subrogation amounts. By allowing the subrogated insurer to sue the tortfeasor or its insurer for failure to protect its subrogation interests, it is spared the "unpalatable alternative" of suing its own insured. While the subrogated insurer may still choose to bring an action against its own insured for breach of the subrogation provisions in the insurance policy, this is not the only alternative.

Third, as numerous courts have noted, the majority view cuts down the opportunities for fraud and sharp practices by the tortfeasor or its insurer. As stated above, when a tortfeasor or its insurer realizes that they may have to pay twice for the same damages, they are less likely to seek a quick settlement from the unwary insured.

Fourth, a subrogated insurer may be more generous in settling with its own insured when it feels secure knowing that it has perfected its subrogation interest by placing the tortfeasor on notice.[50]The subrogated insurer does not have to worry about what its insured is doing without its knowledge.[51]

For these reasons, it makes sense for Iowa courts, when called upon

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ARE INSURANCE COMPANIES OBLIGATED TO PROTECT OTHER INSURANCE COMPANIES?

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to decide this issue, to follow the majority rule and find that a tortfeasor and its insurance carrier have a duty to protect the subrogation interest of an injured party's insurer when notified of that subrogation interest prior to settlement with the injured party.

1. *United Security Insurance Co. v. Johnson*, 278 N.W.2d 29, 31 (Iowa 1979).
2. *Id.*
3. The jurisdictions so holding include the Second Circuit Court of Appeals, Alabama, Arkansas, California, Colorado, the District of Columbia, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Washington, and Wisconsin.
4. *See Inter-Insurance Exch. of Chicago Motor Club v. Truck Ins. Exch., Inc.*, 410 N.W.2d 1103 (Ill. App. Ct. 1980); *Travelers Indem. Co. v. Vaccari*, 245 N.W.2d 844 (Minn. 1976); *Erie Ins. Exch. v. Calvert Fire Ins. Co.*, 252 A.2d 840 (Md. 1969)
5. *See* 16 RONALD A. ANDERSON, COUCH CYCLOPEDIA OF INSURANCE LAW § 61:201 (2d ed. 1983).
6. *Wolverine Ins. Co. v. Klomparens*, 263 N.W. 724, 725 (1935).
7. *Travelers Indem. Co. v. Vaccari*, 245 N.W.2d 844, 847-48 (1976). *See also Transamerica Ins. Co. v. Barnes*, 505 P.2d 783 (Utah 1972).
8. *Inter-Insurance Exch. of Chicago Motor Club v. Truck Ins. Exch., Inc.*, 410 N.W.2d 1103, 1106 (Ill. App. Ct. 1980).
9. *Id.* at 1104.
10. *Id.* at 1106 (citing *Home Ins. Co. v. Hertz Corp.*, 375 N.E.2d 115, 118 (Ill. 1978)).
11. *Ortega v. Motors Ins. Corp.*, 552 So. 2d 1127 (Fla. Dist. Ct. App. 1989).
12. Id.at 1128.
13. *Id.*
14. *See* Gwen Veronica Carroll, *Insurance Subrogation Actions No Longer Barred by General Releases in Illinois — Home Insurance Company v. Hertz Corporation*, 28 DEPAUL L. REV. 189, 195 n.32 (1978).
15. *Id.*
16. D.E. Buckner, Annotation, *Rights and Remedies of Property Insurer as Against Third-Person Tortfeasor who has Settled with Insured*, 92 A.L.R.2d 102, 107 (1963).
17. ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES s. 3.07 (2d. ed. 1988). *See also* 3 ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE s. 23.04(1) (1992).
18. *Id.*
19. WINDT, *supra* note 17, s. 3.07.
20. *Conard v. Moreland*, 230 Iowa 520, 298 N.W.2d 628 (1941).
21. *Id.* at 629.
22. *Id.* at 630.
23. Buckner, supra note 16, at 109.
24. *See Erie Ins. Exch. v. Calvert Fire Ins. Co.*, 252 A.2d 840 (Md. 1969); *Davenport v. State Farm Mut. Auto. Ins. Co.*, 404 P.2d 10 (Nev. 1965).
25. Buckner, supra note 16, at 111. *See Neuss, Hesslein & Co. v. 380 Canal St. Realty Corp.*, 168 N.Y.S.2d 579 (N.Y. Sup. Ct. 1957).
26. *Aetna Cas. & Sur. Co. v. Norwalk Foods, Inc.*, 480 N.Y.S.2d 851, 853 (N.Y. Civ. Ct. 1984) (relying on *Ocean Acc. & Guar. Corp. v. Hooker Electrochemical Co.*, 147 N.E. 351 (1925)).
27. *Id.* at 854.
28. *Id.*
29. *Poole Truck Line, Inc. v. State Farm Mut. Auto. Ins. Co.*, 294 S.E.2d 570, 570 (Ga. Ct. App. 1982).
30. *Id.* at 572.
31. *Bernhard v. Delluaitante*, 43 P.2d 338, 338-39 (Cal. Dist. Ct. App. 1935).
32. *Id.* at 339.
33. This issue differs from the situation where the insured settles with the tortfeasor for an amount which is intended to cover *all* damages but which the insured believes does not fully compensation him or her for the losses incurred. That situation arose in the Iowa case of *Ludwig v. Farm Bureau Mutual Insurance Co.*, 393 N.W.2d 143 (Iowa 1986).
34. *See Camden Fire Ins. Ass'n v. Prezioso*, 116 A. 694 (N.J. Ch. 1922). Of course, as discussed earlier, when the tortfeasor has no knowledge of the existence of any insurance or potential subrogation interest, the general release is effective to fully release the tortfeasor.
35. *Dickhans v. Missouri Prop. Ins. Placement Facility*, 705 S.W.2d 104, 106 (Mo. Ct. App. 1986). In *Dickhans*, the tortfeasor had been notified by the injured party's insurer that, if called upon to pay its insured under its policy, the insurer would pursue its subrogation rights. Knowing this, the tortfeasor settled with the injured party prior to the insurer's payment.
36. *Id.*
37. LONG, supra note 17, s. 23.04(1). A court may also exercise its equitable jurisdiction to reform the release to reflect only a release of the injured party's interest, not the subrogated insurer's interest. Buckner, supra note 16, at 108.
38. *See State Farm Mut. Auto. Ins. Co. v. Lou*, 678 P.2d 339, 342 (1984).
39. *Preferred Risk Mut. Ins. Co. v. Courtney*, 393 So. 2d 1328, 1329 (Miss. 1981).
40. *Id.*at 1332.
41. *Id.* at 1332-33.
42. *Inter-Insurance Exch. of Chicago Motor Club v. Andersen*, 73 N.E.2d 12 (Ill. App. Ct. 1947).
43. *Id.* at 15.
44. *Id.*
45. *Id.*
46. *Home Ins. Co. v. Hertz Corp.*, 375 N.E.2d 115 (Ill. 1978).
47. *Id.* at 117.
48. *Id.*
49. *Id.* at 118.
50. Carroll, supra note 14, at 202.
51. *Id.*□

SUPREME COURT INTERPRETS *"HERNANDEZ"* AMENDMENT TO U.I.M. STATUTE

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this coverage applies:

a. as excess to any underinsured motor vehicle coverage which applies to the vehicle as primary coverage, but

b. only in the amount by which it exceeds the primary coverage...."

Based on the above policy language, State Farm filed a Motion for Summary Judgment which was granted by the District Court. On appeal *Mewes* argued in part that enforcement of State Farm's "excess" and "anti-stacking" provisions frustrated the policy goals of underinsured motorist coverage. In analyzing the 1991 amendments to Iowa Code Section 516A.2 the Iowa Supreme Court sustained the District Court's grant of summary judgment in favor of State Farm.

The *Mewes* decision is significant not only because it is one of the first cases to interpret the 1991 amendments to 516A.2. The decision arguably signals the use of a "narrow coverage" view by the court in analyzing not only uninsured motorist claims but also underinsured motorist claims. The following language from *Mewes* is significant:

> "An alternative view of insurance coverage is the "narrow coverage" view. *Veach*, 460 N.W. 2d at 848; *Northland*, 424 N.W.2d at 449. Under a narrow coverage view of underinsurance policies, the goal of underinsurance is merely to place victims in the same position in which they would have been had they been injured by motorists carrying liability coverage equal to the limits of their own coverage. *Northland*, 424 N.W2d at 449.
>
> Therefore, under a narrow coverage definition of underinsurance, any amount the injured party receives from another party's carrier is subtracted from the policy limit of the injured party's underinsurance policy, and the injured party's underinsurance carrier is only responsible for any difference between the coverage provided by the other carrier and the injured party's own highest policy limit. *Id.* We have traditionally applied this view to uninsured coverage, but not to underinsurance coverage. *Id.*"

At a minimum, the *Mewes* decision signals an end to the use of the "broad coverage" view in analyzing underinsured coverage. Use of a single analytical approach to un-, underinsured and hit-and-run motorist coverage analysis would make it easier for the bench and the bar in analyzing coverage disputes in this area. □

PRODUCTS LIABILITY OF NONMANUFACTURERS - § 613.18

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facts" and then present the issue of the applicability of § 613.18 to the trial court for determination is peculiar and does not seem to contemplate the possibility of a factual issue, i.e., whether or not a defendant was involved in the assembly, design or manufacture of the product, to be decided by the trier of fact. However, in most cases, the pertinent facts in that regard will probably be sufficiently clear to allow a pre-trial determination of the applicability of § 613.18. Requests for admissions and related interrogatories regarding the involvement of a nonmanufacturer defendant would be an effective way of establishing the requisite facts if they are not established by the pleadings.

2.*Does the protection provided by § 613.18, when applicable, effectively insulate nonmanufacturers from all products liability claims?*

No. Section 613.18 only applies to theories of strict liability (Restatement (Second) of Torts, § 402A) and breach of implied warranty of merchantability (§ 554.2314). A negligence theory is often included in a products liability petition and is unaffected by

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PRODUCTS LIABILITY OF NONMANUFACTURERS - § 613.18 *Continued from page 13*

the statute. That might include a claim of negligent design or manufacture or negligent failure to warn. Also, breach of express warranty and breach of implied warranty of fitness for particular purpose appear to fall outside the statute. That is presumably due to the nonmanufacturer's more affirmative role (specific representation and specific selection of the product) in those contexts. (See Chapter 1100 of the Iowa Civil Jury Instructions regarding the elements of these breach of warranty claims.)

3.What is the difference between §613.18(1)(a) and §613.18(1)(b)?

Section 613.18(1)(a) provides nonmanufacturers immunity from claims alleging strict liability in tort or breach of implied warranty of merchantability which arise solely from an alleged defect in the original design or manufacture of a product. This immunity is absolute; it does not depend upon the manufacturer's solvency or amenability to suit. The key requirement is that the alleged defect must relate to original design or manufacture.

Section 613.18(1)(b) provides qualified protection from claims alleging strict liability and breach of implied warranty of merchantability where those claims are based upon something other than an alleged defect in original design or manufacture. In such cases, the protection only attaches "upon proof that the manufacturer is subject to the jurisdiction of the courts of this state and has not been judicially declared insolvent." (See later discussion.) Again, that qualification relates only to claims based upon defects other than those relating to original design or manufacture and "does not impose a limitation upon the immunity protection of sub-section 613.18(l)(a)." *Bingham v. Marshall & Huschart Machinery,* 485 N.W.2d 78, 80 (Iowa 1992).

In *Bingham,* the Iowa Supreme Court commented that, "Examples of suits arising under paragraph 613.18(1)(b) include suits under strict liability for failure to warn about the dangers of a product." 485 N.W.2d at 80. In a subsequent case, *Olson v. Prosoco, Inc.,* 522 N.W.2d 284 (Iowa 1994), the Court ruled that failure to warn is regarded as a negligence concept only and may no longer constitute a product defect under a strict liability theory. Therefore, notwithstanding the above-quoted dicta in *Bingham,* failure to warn claims now fall outside the purview of § 613.18. With the removal of failure to warn claims, strict liability or breach of implied warranty of merchantability claims which are not based upon defects in original design or manufacture are far fewer. They would generally involve a change in a product by a nonmanufacturer (i.e., removal of a guard) which rendered the product defective and unreasonably dangerous.

4. What is contemplated by the qualifying phrase in § 613.18(1)(b) " . . . upon proof that the manufacturer is subject to the jurisdiction of the courts of this state and has not been judicially declared insolvent"?

The requirement of personal jurisdiction is easily understood and need not be addressed. The requirement that the manufacturer "has not been judicially declared-insolvent" raises some interesting questions. While the purpose of both requirements is obviously to provide plaintiffs with a remedy (against nonmanufacturers) in non-original defect cases where the manufacturer is insolvent, the application of the solvency requirement is potentially more troublesome than it might first appear.

It must be kept in mind that under *Erickson,* the plaintiff has the burden to prove that the defendant seller does not qualify for the protection provided by § 613.18. Therefore, in § 613.18(1)(b) cases, a plaintiff is placed in the peculiar position of having to prove either that the manufacturer is not subject to suit in Iowa or has been judicially declared insolvent. The notion of requiring a plaintiff to prove the non-applicability of the statute is conceptually troubling and somewhat at odds with the otherwise simple language of the provision.

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PRODUCTS LIABILITY OF NONMANUFACTURERS - § 613.18 *Continued from page 14*

The language clearly appears to contemplate "proof" of the manufacturer's amenability to suit in Iowa and the absence of any judicial declaration of insolvency of the manufacturer. By placing the burden on the plaintiff, the proof required is effectively the reverse of the proof contemplated by the statute. That argument was raised in *Erickson,* but not addressed by the Court. It would seem to make more sense for the burden to prove jurisdiction and the solvency of the manufacturer to be upon the defendant nonmanufacturer that seeks the protection provided by § 613.18(1)(b).

Numerous questions are yet unanswered regarding the solvency requirement. Because the plaintiff has the burden of proving the nonapplicability of § 613.18, it should probably be regarded as the insolvency requirement. How does a plaintiff go about proving that a manufacturer *has* been "judicially declared insolvent?" Does it require an order from a bankruptcy court? What about non-liquidation or reorganization bankruptcies? What is the appropriate test of insolvency? May a district court, upon application, "judicially" declare a manufacturer insolvent for purposes of § 613.18(1)(b)? If so, what type of proof is required? Is it possibly a question for the jury? As of what point in time should the manufacturer's solvency be evaluated? What if it changes during the pendency of the case? What about liability insurance, particularly if there is a coverage dispute? Should the plaintiff's unliquidated claim (or related cross-claims by solvent defendants) be considered in evaluating the solvency of the manufacturer? How should it be valued?

Many of these questions produce further questions and could be analyzed and debated at length, far beyond the scope and purpose of this discussion. The most salient is whether or not a trial court, as opposed to a bankruptcy court, may render a judicial declaration of insolvency. In *Bingham,* a bankruptcy court had declared the manufacturer insolvent. The plaintiff then (probably unnecessarily) filed a motion to have the trial court declare the manufacturer insolvent and thereby avoid the application of § 613.18(1)(b) to the distributor. The trial court denied the motion, but dismissed the strict liability and breach of warranty claims against the distributor under § 613.18(l)(a) for the reason that those claims were based solely upon an alleged defect in original design or manufacture. (The case proceeded to trial on the negligence theory and judgment was entered for the defendant.) The Iowa Supreme Court affirmed the dismissal without commenting upon the authority of the district court to declare a party insolvent as requested by the plaintiff.

5. Which provision, § 613.18(1)(a) or § 613.18(1)(b), applies in actions alleging both a defect in original design or manufacture and another type of defect?

Although the distinction between the two provisions is blurred by their inartful language, common sense would indicate that § 1(a) should apply to the original defect claim and § 1(b) should apply to the non-original defect claim. Nonetheless, I have seen it argued (*Erickson*) that § 1(a) has no application in such cases. The argument seizes upon the phrase "which arises solely from . . ." in § 1(a) for the proposition that the presence of any other claim of defect necessarily brings the entire action under § 1(b), thereby invoking the jurisdiction and solvency issues.

It is difficult to conceive that the level of protection provided by § 613.18 is dependent upon the pleading whimsy of plaintiff's counsel. Section 1(a) should and presumably does apply to all claims based upon original defects, regardless whether non-original defects are alleged as well. That issue was raised on appeal in *Erickson,* but the Court based its ruling on another issue and did not address it. The issue was not present in *Bingham* inasmuch as the claim was based solely upon an alleged original defect.

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PRODUCTS LIABILITY OF NONMANUFACTURERS - § 613.18 *Continued from page 15*

6. Why is the protection by § 613.18(2) limited to retailers (instead of all nonmanufacturers) that assemble products, and why is the protection qualified in the same way as § 613.18(1)(b)?

I don't know. Section 613.18(2) obviously recognizes that the assembly of some products has no relationship to any defects in those products, such that the assembler should in those cases have some protection from liability arising from such defects.

There is no apparent reason why the protection provided for these mere assemblers should be limited to retailers who assemble, while the protection provided under § 613.18(1)(a) applies to wholesalers, retailers, distributors and others who sell a product. Why should a wholesaler or distributor who performs some insignificant assembly be subject to strict liability and implied warranty claims against which a retailer who does the same thing is protected? It seems to constitute a "double standard" with no reasonable basis.

The same "double standard" analysis applies to the qualification in § 613.18(2) that the manufacturer must be subject to the jurisdiction of the Iowa courts and not have been judicially declared insolvent. If the assembly performed by a retailer is insignificant ("having no causal relationship to the injury"), why should the protection provided to the retailer be any less than if the retailer had performed no assembly?

Finally, under § 613.18(2), a retailer that performs insignificant assembly has no protection from allegations of non-original defects, while a retailer that performs no assembly has the qualified protection of § 613.18(1)(b). Again, there is no apparent reason to distinguish between retailers (or other mere sellers) on the basis of whether or not they perform assembly which has "no causal relationship to the injury from which the claim arises..." (For you constitutional scholars, there may even be an equal protection argument in there somewhere!)

7. Are there any limitations to the tolling provision in § 613.18(3)?

Probably. There are no appellate cases involving § 613.18(3), but a manufacturer not sued within the statute of limitations period could make the argument that notwithstanding the claimant's certification to the contrary, its identity was indeed known or knowable through reasonable diligence before the statute of limitations period expired.

Similarly, there would presumably be some reasonable limitation upon the length of time a claimant has to identify a manufacturer through discovery. The key considerations would be reasonable diligence on the part of the claimant and lack of prejudice to the manufacturer in the preparation of its defense.

This tolling provision is somewhat analogous to § 668.8, under which the filing of a petition under Chapter 668 "tolls the statute of limitations for the commencement of an action against all parties who may be assessed any percentage of fault under this chapter." As contemplated in *Betsworth v. Morey's and Raymond's,* 423 N.W.2d 196 (Iowa 1988), §668.8 could constitute an alternative basis to sue a manufacturer after the statute of limitations period has expired, but only if the manufacturer has been brought into the case as a third-party defendant.□

More Murphy's Laws

- Nothing is as inevitable as a mistake whose time has come.
- If at first you don't succeed, destroy all evidence that you tried.
- There is no job so simple that it cannot be done wrong.
- If anything is used to its full potential, it will break.
- The number of minor illnesses amoung employees is inversely proportional to the health of the organization.
- If something is confidential, it will be left in the copier machine.

— Author Bloch, *Murphy's Law Book Three*

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cretion. The Trial Court did not make a finding of willfulness, fault or bad faith.

9. *Tomka v. Hoechst Celanese Corp.*, 528 N.W.2d 103 (Iowa 1995)

Warranty Claims

Plaintiff sued because growth hormones failed to result in weight gain in cattle. Tort theories (strict liability in negligence) properly dismissed because Plaintiff had economic loss and not property damage. "Tort law does not encompass this type of damage." Plaintiff could not rely on breach of express warranty because he was suing for consequential economic loss (not property damage) and he was not in privity with the manufacturer. The implied warranty theories were dismissed for the same reason. Plaintiff should look to the local veterinarians from whom he purchased the product.

10. *Kiesecker v. Webster Custom Meats*, 528 N.W.2d 109 (Iowa 1995)

Work Comp

Eight percent permanent partial disability award upheld. Claimant wanted more based on lay testimony concerning the disability.

11. *Stephens v. Des Moines School District*, 528 N.W.2d 117 (Iowa 1995)

Superseding Cause

Court reverses defense verdict. Trial court erred in submitting "superseding cause" instruction, where student was assaulted by classmate. Jury found that school district was negligent, but also found that negligence was not a proximate cause of the injury.

12. *Schmitz v. Crotty*, 528 N.W.2d 112 (Iowa 1995)

Malpractice

Legal malpractice case. Attorney held liable for failure to exercise reasonable care in handling of death tax returns. Attorney failed to use accurate legal descriptions and estate overpaid the tax. No expert testimony was required.

13. *Lonq v. Roberts Dairy*, 528 N.W.2d 122 (Iowa 1995)

Work Comp

It was reasonable for employer to recommend that claimant be treated at a University hospital rather than Mayo Clinic.

14. *2800 Corp. v. Fernandez*, 528 N.W.2d 124 (Iowa 1995)

Work Comp

Exotic dancer recovers for injuries sustained in automobile accident. She was intoxicated at the time. Basis for decision was that employer condoned excessive drinking by employee-dancers.

15. *Jackson v. Farm Bureau*, 528 N.W.2d 517 (Iowa 1995)

Underinsurance Coverage

Recovery under underinsured policy is reduced by disability benefits received by the injured policyholder.

16. *Red Giant Oil Co. v. Lawler*, 528 N.W.2d 524 (Iowa 1995)

Bad Faith

Plaintiff sued tortfeasor for negligent welding. LeMars Mutual refused to defend the tortfeasor. Tortfeasor confessed judgment and assigned his claims against insurance company and agent to the Plaintiff, who then files this lawsuit against the insurance company and agent. Trial court grants summary judgment. Supreme Court reverses. This arrangement is not inherently collusive, fraudulent or against public policy.

17. *Marks v. Estate of Hartaerink*, 528 N.W.2d 539 (Iowa 1995)

Defamation

Plaintiff filed defamation case over his excommunication from Trinity Reformed Church of Allison, Iowa. Summary judgment granted for Defendants. Extensive discussion of numerous issues related to the law of defamation.

18. *Hanson v. State of Iowa*, 528 N.W.2d 547 (Iowa 1995)

Municipal Liability

Action brought against State and Arnolds Park, Iowa, alleging fatal accident caused by failure to remove ice and snow from roadway. Summary judgment for State and City affirmed by Supreme Court. Defendants are immune from liability under statute if they comply with their own written policies.

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19. *FDIC v. American Casualty Co. of Reddinq*, 528 N.W.2d 605 (Iowa 1995)

Insurance

Certified question of law from federal court. Question is whether coverage exists for claims which are made after the expiration of the coverage period, when notice of the occurrence or potential claim was given only during the "discovery period." Court states that no such coverage is provided. The policy remains a claims made policy despite a "discovery clause."

20. *VandeKoop v. McGill*, 528 N.W.2d 609 (Iowa 1995)

Legal Malpractice

Legal malpractice case. Defendant attorney drafted antenuptial agreement which did not contain provisions governing disposition of property in the event of divorce. Summary judgment granted by district court. Affirmed by Supreme Court. Plaintiff contended that he wanted "divorce insurance." The court held that there was no indication that the wife would have signed an antenuptial agreement containing divorce provisions. Further, the record clearly showed that the Plaintiff was fully aware of the provisions of the agreement at the time that he signed it. The court also found that the law at the time the antenuptial agreement was executed was such that the agreement would have been declared void in violation of public policy.

21. *Thilges v. Snap-on-Tools Corp.*, 528 N.W.2d 614 (Iowa 1995)

Work Comp

Various work comp issues are addressed.

22. *Manpower Temporary Services v. Sioson*, 529 N.W.2d 259 (Iowa 1995)

Work Comp

Claimant was working at the University of Iowa when she was shot by a University student and rendered a quadriplegic. Court held that the term "care" includes a modified van. This was an "appliance" for the purpose of worker's compensation statute.The Claimant was properly ordered to bear the expenses of repair, fuel, title, license and insurance.

23. *Terwilliaer v. Snap-on-Tools*, 529 N.W.2d 267 (Iowa 1995)

Work Comp

This is another case in which the Claimant contended that the court did not give enough credibility to lay testimony regarding the degree of disability. The Claimant had only received 20 weeks of permanent partial disability. The court held that the Commissioner was justified in considering the Defendant's medical evidence to be more reliable because of the likelihood that the Claimant magnified her symptoms.

24. *Meyers v. DeLaney*, 529 N.W.2d 288 (Iowa 1995)

Premises Liability

A tree limb fell on the Plaintiff's foot. The case was tried to the court and a defense verdict was returned. The tree owner may be held liable only for injuries caused by the defective condition of the tree, if the tree owner had actual or construction knowledge of the tree's defective condition. "Contrary to the argument advanced by [Plaintiff], we think it would be onerous indeed to burden a land owner with the duty to inspect trees for non-visible decay."

25. *McDonnell v. Chally*, 529 N.W.2d 611 (Iowa App. 1995)

Mitigation of Damages

Supreme Court reaffirms that a Plaintiff's failure to attempt to lose weight and/or perform physical therapy as ordered by her doctor warranted mitigation instruction. In this case the Plaintiff was injured in a rear-end collision. The court found that the driver of the Plaintiff's own vehicle was 30% at fault, the driver of the rear-ending vehicle was 30% at fault, and the passenger was 40% at fault due to her failure to mitigate damages.

26. *Collins v. Department of Human Services*, 529 N.W.2d 627 (Iowa App. 1995)

Work Comp

Claimant had 20% permanent partial disability in each hand for bilateral carpal tunnel syndrome.

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APPELLATE CASE UPDATE

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The court held that the Claimant was entitled to industrial disability based on an injury to a scheduled member, her hands, and also to a part of the body not included—her nervous system, due to the fact that she had reflex sympathetic dystrophy. She was also entitled to recover for any psychological condition caused or aggravated by a scheduled injury.

27. *Condon v. Employers Mutual Casualty Co.*, 529 N.W.2d 630 (Iowa App. 1995)

Uninsured Motorist

At time of trial the parties were the estate of the decedent and the Defendant insurance company. Court held that the worker's compensation benefits paid or payable to the surviving spouse, was not an offset against the liability of Employers Mutual under its uninsured motorist coverage. In addition, the court agreed with the trial judgment that the jury should not hear evidence of the worker's compensation benefits that the widow was receiving.

28. *Wende v. Orv Rocker, Ford, Lincoln, Mercury*, 530 N.W.2d 92 (Iowa App. 1995)

Settlement Agreement

Plaintiff attempts to back out of settlement. Defendants file motion in pending case to enforce settlement agreement. Motion was sustained by court. Affirmed by Supreme Court. Agreement was enforceable despite not being in writing. Although matter could be a jury issue, defendant waived the right by not requesting a jury trial, when she resisted the motion. "It is generally recognized that courts have authority to enforce settlement agreements made in a pending case."

29. *Strup v. Reno*, 530 N.W.2d 441 (Iowa 1995)

Work Comp

In a 5-4 decision, court holds that a claimant who brings an unsuccessful tort action against an uninsured employer, and loses, may not thereafter file a workers' compensation action against the uninsured employer for limited benefits. The claimant has "elected his remedies."

30. *Johnson v. International Paper Co.*, 530 N.W.2d 475 (Iowa App. 1995

Work Comp

Claimant left work early one day due to pain in legs. Eight months later he filed a worker's compensation claim. Court holds that plaintiff is entitled to proceed with claim where he did not provide notice of a work related injury to the employer within 90 days. Although there is an "actual knowledge" exception, knowledge that the claimant was having problems is not the same as knowledge that he has a work related injury. □

1995 LEGISLATIVE SESSION

Continued from page 6

actions. These bills remain in the House Judiciary Committee and Senate Judiciary Committee, respectively.

House File 250 (Companion bill SSB 2631 - This legislation provides that the percentage of fault assigned to the person whose death or injury gave rise to a consortium claim shall apply to reduce or bar a judgment for loss of consortium and overrules *Schwennen v. Abell,* 430 N.W.2d 98 (Iowa 1988). These bills remain in the House Judiciary Committee and the Senate Judiciary Committee respectively.

All of the above legislation, except Senate File 431 which has already received legislative and gubernatorial approval, remain alive and eligible for consideration in 1996.

While 1995 was a busy and often frustrating year, I am pleased to report that no legislation of an adverse nature to the Iowa Defense Counsel Association won legislative approval. Additionally, I am pleased that I continue to be looked to for leadership by legislators, lobbyists and other interest groups sharing our legislative perspective on the above legislation.

I want to thank all of the members of the Iowa Defense Counsel Association for the opportunity to have represented them this past year. Additionally, I would like to extend a special thank you to the Legislative Committee and its Chairperson, Mark Tripp, for all of the support and assistance given to me at every request. I look forward to working with you in the days ahead. Thank You! □

"THE JUDGE CAN'T COME TO THE PHONE RIGHT NOW — HE'S RESTING ON HIS LAURELS."

WELCOME NEW MEMBERS

Rachel R. W. Schoenig
Des Moines

Karl T. Olson
Des Moines

SETTLEMENT EVALUATION

By Philip Willson, Council Bluffs, Iowa

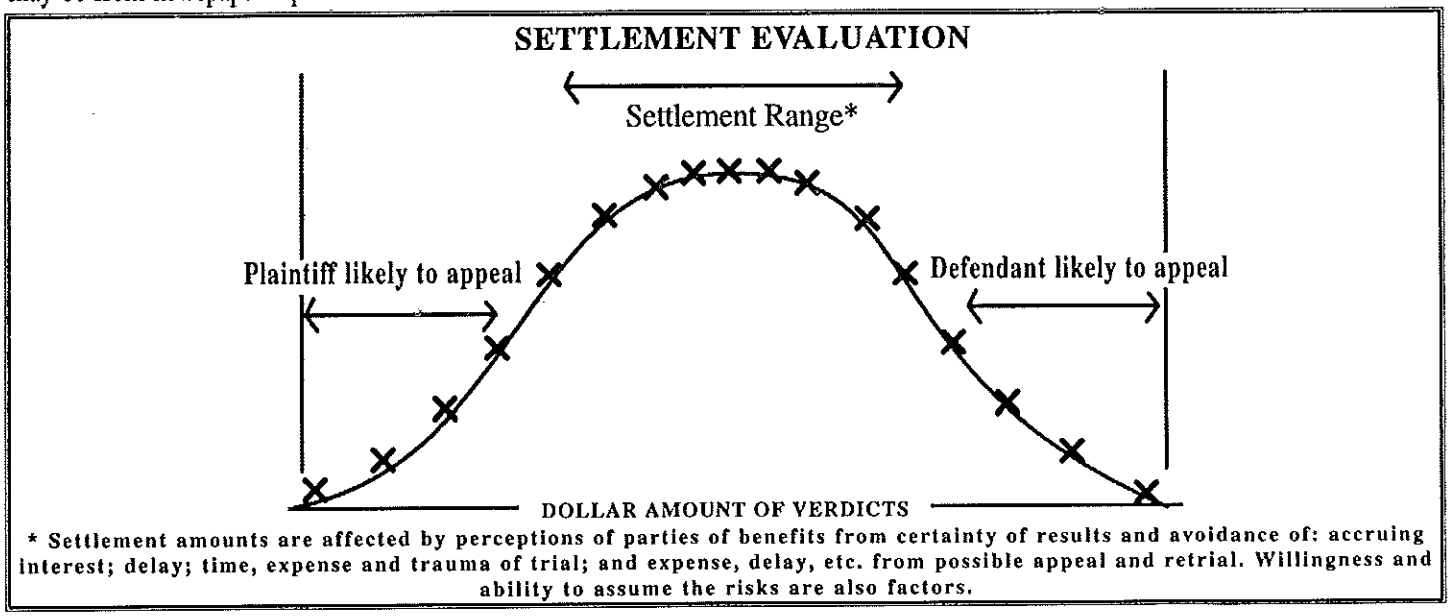
If the same case were tried to many different juries, the results could be plotted on a bell curve. Such a hypothetical bell curve is set out at the end of this article. An ideal settlement would be in the range at the top of the bell curve and would be made as quickly as possible to reduce costs.

An analogy can be drawn between settlement negotiations and the classic definition of market value. In settlement negotiations, a defendant is attempting to "buy" a release. Fair market value is defined as the value which a willing buyer and a willing seller, both well informed as to the facts, but neither under any compulsion to act, would establish in an arm's length sale, and each being familiar with all the facts relating to the particular property. See Iowa Code § 441.21(1)(b).

In the ideal settlement, each party would be familiar with all of the facts. Other jury verdicts are relevant facts just as other sales are relevant to market value. Attorneys and insurers are familiar with other verdicts and settlements but plaintiff's only information may be from newspaper reports of unusually high verdicts or from friends who have given opinions about the value of a case. In order to reach a fair settlement, an effort should be made to assure that the claimant is aware of the risks of trial. The bell curve may be useful to illustrate the risks. Likewise, both parties need to be aware of both the strengths and weaknesses of facts and law relating to the case. In reaching a fair settlement, both sides have an incentive to fully inform the other side of the strengths of the facts and law from their point of view and the weaknesses relating to facts and law as they apply to the other party. Once the parties are fully informed about the facts, law and results in other cases, the parties are "ready" to negotiate from that point of view. However, both sides may not be "willing" to settle. Settlement negotiations or mediations are not usually successful unless both parties are willing to settle.

The final settlement figure may be toward one side or the other of the bell curve. Some of the factors affecting the settlement amount are set out in the footnote to the bell curve. The abilities and personalities of the lawyers are important factors. The financial ability of a claimant to wait for trial and to be willing and able to absorb the risk of a bad result are also important factors. It is difficult for a claimant to properly evaluate some of the factors, including the time, expense and trauma of a trial. In order to reach a fair settlement, an effort should be made to make certain that the claimant is aware of those factors.

There is more and more pressure to reach early settlement to reduce expenses. A person who is going to try to negotiate settlement must make a difficult judgment as to when both parties are familiar with the relevant facts and are willing to settle. Often we concentrate on our own evaluation of settlement value of a case. In order to reach a fair settlement, we also need to make an effort to make certain that the claimant, and claimant's attorney, are fully informed of facts and law, including both strengths and weaknesses. The attached bell curve may be useful in explaining some of the factors.□



1995 IOWA DEFENSE COUNSEL ANNUAL MEETING

The 1995 Iowa Defense Counsel Annual Meeting and Seminar will be held **Wednesday, September 20 through Friday September 22** at the Embassy Suites Hotel in Des Moines. In addition to an outstanding CLE program, this year's meeting will be highlighted by the banquet being held at the excitingly new, and much talked about ... ***Glen Oaks Country Club!***

We are pleased to hear that the Wednesday through Friday meeting format has made it more convenient for our members to attend the seminar sessions so we will continue with this format in the future. We anticipate this year's seminar program will qualify for 15 hours CLE credit, including 2 hours ethics, and at least 6 hours of federal CLE.

If you haven't reserved these dates for IDCA, better do so today. You will receive the registration materials mid-August - please register early! Non-members may contact DeWayne Stroud at 515-225-5608 for registration materials after August 15.

WEDNESDAY

9:00 a.m. Registration

1:00 p.m. Introduction & Report of Association

1:15-2:00 Daubert & Expert Rules
- John C. Gray
  Eidsmoe, Heidman, Redmond, Fredregill, Patterson & Schatz, Sioux City, Iowa

2:00-2:45 Annual Appellate Update, Pt.1
- Steven L. Serck
  Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C., Des Moines, Iowa

2:45-3:15 Defamation and its Defenses in Iowa
- Glenn L. Smith
  Finley, Alt, Smith, Scharnberg, May & Craig, P.C., Des Moines, Iowa

3:15-3:30 BREAK

3:30-4:00 A Report on the First Joint Trial Academy
- Training Young Lawyers
- Robert D. Houghton
  Shuttleworth & Ingersoll, Cedar Rapids, Iowa

- Deborah J. Hughes
  Irvine & Robbins, Cedar Rapids, Iowa

4:00-4:30 Tortious Interference: Elements and Defenses
- Richard K. Whitty
  O'Connor & Thomas, P.C., Dubuque, Iowa

4:30-5:00 Civil RICO
- Brad J.Brady
  Crawford, Sullivan, Read, Roemerman & Brady, Cedar Rapids, Iowa

5:15-8:00 COCKTAILS - Embassy Suites Hotel
(Dinner on your own in Des Moines)

THURSDAY

8:30-9:00 Legislative Developments
- Robert M. Kreamer
  Whitfield & Eddy, Des Moines, Iowa

9:00-12:15 Employment Law
- Jaki K. Samuelson
  Whitfield & Eddy, Des Moines, Iowa

- Mark L. Zaiger
  Shuttleworth & Ingersoll, Cedar Rapids, Iowa

- Constance A. Schriver
  Lane & Waterman, Davenport, Iowa

10:15-10:30 BREAK

12:15-12:45 LUNCH

12:45 Supreme Court Report
- Hon. Linda K. Newman
  Iowa Supreme Court, Davenport, Iowa

1:15-3:15 Women as Defense Counsel

1:15 Introduction:
- Jaki K. Samuelson
  Whitfield & Eddy, Des Moines, Iowa

1:25 Understanding Gender Bias I:
- H.Richard Smith
  Ahlers, Cooney, Dorweiler,Haynie, Smith & Allbee, P.C., Des Moines, Iowa

(Thursday cont.)

1:50 Understanding Gender Bias II:
- Janet Griffin
  Blue Cross / Blue Shield of Iowa, Des Moines, Iowa

2:15 How Are We Doing In Iowa:
- Judge James R. Havercamp
  Chief Judge Seventh Judicial District,Davenport, Iowa

2:45 Looking to the Future:
- Megan Antenucci
  Whitfield & Eddy, Des Moines, Iowa

3:15-3:30 BREAK

3:30-4:15 Annual Appellate Update, Part II
- Leonard T. Strand
  Simmons, Perrine, Albright & Ellwood, Cedar Rapids, Iowa

4:15-5:00 Negotiation and Evaluation - Structured Settlements
- Jerry Lothrop
  Capitol Planning, Inc., St. Louis Park, Minnesota

5:00-5:15 Election of Officers and Directors and Annual Meeting of IDCA

6:00-7:30 Reception - Glen Oaks Country Club

7:30 Banquet - Glen Oaks Country Club

FRIDAY

7:30-8:30 Board of Directors' Meeting

8:30-9:15 Annual Appellate Update, Part III
- Rex B. Staub
  Bradshaw, Fowler, Proctor & Fairgrave, Des Moines, Iowa

9:15-9:45 Ethics and Billing
- Joseph C. Holland
  Iowa City, Iowa

9:45-10:15 Client Relations, Imminent Pressure Points
- Wendy N. Munyon
  Grinnell Mutual Reinsurance Co., Grinnell, Iowa

- Sharon Soorholtz Greer
  Cartwright, Druker & Ryden, Marshalltown, Iowa

10:15-10:30 BREAK

10:30-11:00 Statistical Proof
- Prof. David Baldus
  University of Iowa, Iowa City, Iowa

11: 00-11:45 Deposition Dilemmas and Ethics of Effective Objecting
- George S. Eichorn
  Eichhorn, Elverson & Vasey, Des Moines, Iowa

11:45-12:15 Attorney Advertising
- Dorothy L. Kelley
  Davison, Burnette & Kelley, Des Moines, Iowa

12:15-12:45 LUNCH

12:45 Federal Court Report
- Hon. Michael Melloy
  U.S. District Judge, N. Dist. Iowa, Cedar Rapids

1:15-2:00 Government Studies and Reports
When Are They Hearsay and When Are They Not
- James W. Carney
  Carney, Williams, Blackburn, Grask & Appleby, Des Moines, Iowa

FROM THE EDITORS

The concept of reducing future damages to present value has long been a part of personal injury litigation in Iowa. Iowa Civil Jury Instruction 200.35 provides that:

Future damages must be reduced to present value. "Present value" is a sum of money paid now in advance which, together with interest earned at a reasonable rate of return, will compensate the plaintiff for future losses.

For years most personal injury cases involving claims for future damages have been submitted with this instruction or its similar predecessor, normally without challenge. Notwithstanding whether or not jurors fully comprehend or apply the concept of present value in their deliberations, it has not been the source of much attention or debate - until now.

On May 24, 1995, the Iowa Supreme Court filed its decision in *Brant v. Bockholt, et al,* No. 107/93-1736, holding that "awards for future noneconomic damages such as pain and suffering and emotional distress need not be reduced to present worth." The Court adopted the reasoning set forth in *Flanigan v. Burlington Northern, Inc.,* 632 F. 2d 880, 886 (8th Cir. 1980):

> The same amount of pain and suffering does not occur from year to year nor can the degree of pain and suffering that will occur in any year be quantified with any degree of certainty. Requiring the reduction of an award for pain and suffering to its present value would improperly allow a jury to infer that pain and suffering can be reduced to a precise arithmetic calculation.

The Court added that, "In considering this conclusion, we would also note that, in addition to the inexact quantification of pain, there is an absence of a precise time of occurrence from which a discount formula may be calculated."

This decision constitutes a departure from the traditional approach to future damages and the concept of present value. I.C.J.I. 200.35 draws no distinction between economic and noneconomic damages, nor should it in our opinion. The rule adopted in *Brant* is premised upon the notion that future noneconomic damages are difficult to quantify. We do not disagree with the premise, but the mere fact that noneconomic damages are difficult to quantify would not seem to justify their exemption from reduction to present value. Indeed, the reduction of such damages to present value would not seem any more difficult or imprecise than the assessment of the damages. Both exercises similarly suffer from the fiction that such intangible losses are capable of reasonable measurement.

Some future economic damages generally regarded as more tangible, such as lost earning capacity, can be as difficult to quantify as so-called noneconomic damages. Nonetheless, they are subject to reduction to present value, obviously in consideration of the time value of money. Whether a present award for future damages is for tangible (economic) or intangible (noneconomic) loss, the simple fact remains that the award will earn or accrue interest from the date of judgment and effectively become inflated as the "future" grows nearer and the damages are actually incurred. By not instructing jurors to reduce awards for future noneconomic damages to present value, they may well apply their own concept of inflation to such awards and compound the problem and the award.

Although the distinction drawn by the Court between economic and noneconomic damages may be intellectually valid, it should not serve to alter the usual approach to future damages in terms of reduction to present value. So extending the distinction effectually produces inflated awards and unnecessarily complicates a process most jurors already find mystifying.□

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